A

RE SATERAS RESOURCES (MALAYSIA) BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
MOHD GHAZALI YUSOFF JCA
B AUGUSTINE PAUL JCA
[CIVIL APPEAL NO. W-02-99-05]
20 FEBRUARY 2006

C ***CIVIL PROCEDURE:*** *Parties - Intervention - Intervener not cited as respondent during appeal - Whether intervener a party - Whether intervener's status and legal rights affected*

CIVIL PROCEDURE: *Appeal - Record of appeal - Non-compliance with Rules of the Court of Appeal 1994 - Whether appeal properly brought*

D

Sateras Resources (M) Berhad ("Sateras") filed a petition in the High Court seeking the sanction of the court for a scheme of arrangement and compromise between itself and its shareholders and creditors ("the proposed scheme") pursuant to s. 176(3) and
E 176(4) of the Companies Act 1965. The applicant and nine others filed notices of their intention to attend and oppose the said petition. The applicant formally sought the approval of the court to intervene and be made a party to the petition of Sateras. The court gave Sateras leave to convene the scheme meetings and on
F 10 September 2004, the meetings were convened among the shareholders and scheme creditors of Sateras. On 3 November 2004, the court allowed the applicant's application and declared the scheme meeting held on 10 September 2004 as being null and void and dismissed the petition.

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Sateras being aggrieved with the said decision filed a notice of appeal on 2 February 2005 to the Court of Appeal. However, the notice of appeal described Sateras as petitioner and no respondent to the appeal was cited. Even the record of appeal made no
H mention at all of any respondent and it contained only the order appealed against in its draft form. The appellant filed a notice of motion in the appeal of Sateras. By this notice of motion the applicant sought to have the notice of appeal filed by Sateras struck off as being defective for failure to name the applicant as a
I respondent to the appeal. The notice of motion also sought for the record of appeal to be struck off for failure to comply with the requirements of r. 18(4)(a), (c), (d) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').

Held (striking off the appeal)
Per Abdul Kadir Sulaiman JCA:

(1) By not citing the applicant as a respondent, being one of the interveners in the court below, and necessarily a party in the proceeding, his status and legal rights would be directly affected by any substantive decision in the appeal. By not having been cited as a respondent in this appeal, he would be facing a problem when it comes to the question of its costs against the appellant. (para 18)

(2) On the issue of the breach of the various provisions of the Rules, the non-compliance resulted in a huge number of exhibits being left out of the record of appeal. The appellant had blatantly disregarded the Rules. The appellant also made no attempt to apply for leave to file a supplementary appeal record. The appeal was thus not properly brought before the court. A similar attitude was adopted by Sateras in pursuing with its appeal. Only at a late hour when it was cornered that a faint attempt was made to seek leave to regularize the appeal process. Such an attitude cannot be condoned. (paras 20 & 21)

Bahasa Malaysia *translation of headnotes*

Sateras Resources (M) Berhad ("Sateras") telah memfailkan satu petisyen dalam Mahkamah Tinggi menuntut kebenaran mahkamah untuk satu skim pengaturan dan kompromi diantaranya dan pemegang-pemegang sahamnya dan pemiutangnya ("skim cadangan") di bawah s. 176(3) dan 176(4) Akta Syarikat 1965. Pemohon dan sembilan orang lain telah menfailkan notis-notis niat mereka untuk hadir dan menentang petisyen tersebut. Pemohon telah secara formal memohon kebenaran mahkamah untuk mencelah dan dijadikan satu pihak kepada petisyen Sateras. Mahkamah telah memberikan Sateras kebenaran untuk mengadakan mesyuarat-mesyuarat Skim dan pada 10 September 2004, mesyuarat-mesyuarat telah diadakan di antara pemegang-pemegang saham dan pemiutang-pemiutang Skim Sateras. Pada 3 November 2004, mahkamah telah membenarkan permohonan pemohon dan telah mendeklarasikan mesyuarat skim yang diadakan pada 10 September 2004 sebagai batal dan taksah dan telah menolak petisyen tersebut.

Sateras yang terkilan dengan keputusan tersebut telah memfailkan satu notis rayuan pada 2 Februari 2005 ke Mahkamah Rayuan. Walau bagaimanapun, notis rayuan tersebut telah menyatakan Sateras sebagai pempetisyen dan tiada responden kepada rayuan tersebut dinamakan. Rekod rayuan juga tidak merujuk kepada mana-mana responden dan ia hanya mengandungi perintah yang dirayu itu dalam bentuk deraf. Perayu telah memfaikan satu notis usul dalam rayuan Sateras. Melalui notis usul ini perayu telah memohon untuk membatalkan notis rayuan yang difailkan oleh Sateras atas alasan ianya cacat kerana gagal menamakan pemohon sebagai seorang responden kepada rayuan tersebut. Notis usul tersebut juga telah memohon untuk rekod rayuan tersebut dibatalkan kerana gagal menepati peruntukan-peruntukan k. 18(4)(a), (c) dan (d) dan k. 18(6) Kaedah-kaedah Mahkamah Rayuan 1994 ('Kaedah-kaedah').

Diputuskan (menolak rayuan)
Oleh Abdul Kadir Sulaiman HMR:

(1) Dengan tidak menamakan pemohon sebagai seorang responden, di mana beliau adalah salah seorang daripada pencelah di mahkamah di bawah, dan semestinya satu pihak di dalam prosiding, statusnya dan hak perundangannya akan terjejas oleh apa-apa keputusan substantif dalam rayuan. Dengan tidak dinamakan sebagai seorang responden di dalam rayuan ini, dia akan menghadapi masalah apabila timbulnya soal kos terhadap perayu.

(2) Mengenai isu ketidakpatuhan peruntukan-peruntukan Kaedah-kaedah, ketidakpatuhan itu telah mengakibatkan banyak ekshibit tidak dimasukkan ke dalam rekod rayuan. Perayu telah secara sengaja tidak mengendahkan Kaedah-kaedah tersebut. Perayu juga tidak mengambil sebarang langkah untuk memohon kebenaran untuk memfailkan rekod rayuan tambahan. Oleh yang demikian, rayuan tersebut tidak dibawa ke mahkamah secara sah. Tingkahlaku yang sama juga telah digunakan oleh Sateras dalam meneruskan rayuannya. Hanya pada saat terakhir apabila ia dikepung, satu percubaan yang tidak bersungguh-sungguh telah dibuat untuk memohon kebenaran untuk membaikpulih proses rayuan tersebut. Tingkahlaku seperti ini tidak boleh dibenarkan.

Case(s) referred to:

Dollar Valley (M) Sdn Bhd v. Rimba Raya Sdn Bhd & Ors [2004] 4 MLJ 6 ***(refd)***

Goh Chin Chye & Anor v. Peck Teck Kian Realty Pte Ltd [1982] 1 MLJ 117 ***(refd)***

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 176(3), (4), 177

Rules of the Court of Appeal 1994, r. 18(4)(a), (c), (d), (6)

Rules of the High Court 1980, O. 42 r. 8(3), (4), O. 88 r. 2(1)

Subordinate Court Rules, O. 49 r. 15(1)

For the applicants - Teh Meng Teck (Marcelle Sinnapa with him); M/s Cheah Teh & Su

For the appellants - Bastian Vendargon (Mahathir Abdullah, Vinod Kamalanathan & Chua Sook Mun with him); M/s Raslan Loong

[Appeal from High Court, Kuala Lumpur; Petition No: D5(D4)-26-79-2004]

Reported by Amutha Suppayah

JUDGMENT

Abdul Kadir Sulaiman JCA:

[1] This is the decision relating to the notice of motion dated 22 March 2005 in encl. (26a) filed on behalf of Sothilingam a/l Subramaniam, (hereinafter referred to as "the applicant"), in the appeal of Sateras Resources (M) Berhad, (hereinafter referred to as "Sateras"), against the decision of the learned High Court judge made on 31 January 2005 declaring the Scheme Meeting held by it on 10 September 2004 as being null and void and that its petition pursuant to s. 176(3) and 176(4) of the Companies Act 1965 being dismissed with costs.

[2] By this notice of motion the applicant applied to this court to have the notice of appeal filed by Sateras struck off as being defective for failure to name any of the interveners, the applicant being one of them, as respondent/s to the appeal. The notice of motion also sought for the record of appeal to be struck off for failure to comply with the requirements of r. 18(4)(a), (c) and (d) and r. 18(6) of the Court of Appeal Rules 1994. It was contended that the appellant had failed to name all the interveners as respondents to the appeal when all those interveners had been

A accepted by the High Court as parties to the petition since 3 November 2004. Further, the notice of the alleged defects had been given to Sateras as early as 9 March 2005 but it had failed to take the necessary steps to rectify the same. The said motion is supported by the affidavit of the applicant himself affirmed on
B 21 March 2005. He is an accountant by profession and one of the creditors of Sateras.

[3] Now, the background history. By Petition No. D5(D4)-26-79-2004 filed in the High Court, Sateras is seeking the sanction
C of the court for a scheme of arrangement and compromise between itself and its shareholders and creditors (hereinafter referred to as "the Proposed Scheme") pursuant to s. 176(3) and 176(4) of the Companies Act 1965. The Proposed Scheme is as set out in the Petitioner's Explanatory Statement to Shareholders
D and Scheme Creditors and Circular to Shareholders dated 18 August 2004. The notice of the petition was published in the New Straits Times on Thursday, 16 September 2004 calling for any person who intends to appear at the hearing of the petition then scheduled for 24 September 2004, to serve or send notice
E of his intention to do so not later than 22 September 2004. In response to the notice, the applicant and nine others filed notices of their intention to attend and oppose the said petition.

[4] In compliance with s. 177 of the Companies Act 1965 and
F pursuant to court orders dated 29 July 2003, 3 November 2003, 10 February 2004 and 11 August 2004 Sateras was given leave to convene the Scheme Meetings. On 10 September 2004, the Meetings were convened among the Shareholders and Scheme Creditors of Sateras.

G **[5]** Before the disposal of the above-mentioned petition by the court, various other interlocutory applications were filed by various parties. The applicant is one. In one of the applications, the applicant formally seek the approval of the court to intervene and be made a party to the petition of Sateras, apart from responding
H to the notice given in the New Straits Time mentioned earlier.

[6] On 3 November 2004, the court made the following orders pertaining to the petition of Seteras and the various other interlocutory applications filed in the matter:

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DAN SETELAH MENDENGAR semua pihak maka hari ini Mahkamah ini memutuskan bahawa semua pihak yang hadir dan/ atau wakil mereka serta pencelah-pencelah diterima sebagai pihak-pihak bagi menentang Petisyen ini dan diarahkan diberi peluang memfailkan dokumen-dokumen mereka dalam Petisyen in dan Saman Pemula No. D4-24-256-2004 dan D4-24-194-2003.

DAN DIARAHKAN JUGA

(i) Permohonan-permohonan pencelah-pencelah dibawah tindakan Saman Pemula D5(D4)-194-2005, Saman Pemula No. DS(D4)-256-2004 dan Petisyen ini didengar bersama dengan Petisyen ini dijadikan sebagai tindakan utama;

(ii) Pencelah-pencelah dibenarkan untuk mengambil bahagian di dalam prosiding ini dan segala Afidavit yang telah difailkan oleh pihak pencelah sebelum 3 Januari 2004 dianggap sebagai sebagai Afidavit Menentang Petisyen ini;

(iii) Pempetisyen menyerahkan semua kertas kausa bagi Petisyen ini kepada pencelah yang hadir disini dlam tempoh masa 3 hari;

(iv) Bahawa hanya pihak-pihak pencelah-pencelah dan/atau pihak-pihak lain yang masih belum memfailkan Afidavit iaitu Lembaga Kumpulan Wang Simpanan Pekerja dan Lembaga Hasil Dalam Negeri diarahkan memfailkan Afidavit Menentang selepas 3 November 2004 dan sebelum 25 November 2004;

(v) Bahawa pihak-pihak tidak dibenarkan memfailkan Afidavit mereka selepas tarikh itu;

(vi) Bahawa pihak Pempetisyen membalas kesemua Afidavit Menentang Petisyen pada atau sebelum 2 Disember 2004;

(vii) Penghujahan Penuh (Bertulis) Pempetisyen hendaklah difailkan pada atau sebelum 13 Disember 2004;

(viii) Penghujahan Penuh (Bertulis) semua pihak-pihak yang menentang Petisyen dan/atau wakil mereka yang hadir di Mahkamah pada hari ini dan pencelah-pencelah hendaklah difailkan pada atau sebelum 27 Disember 2004;

(ix) Penghujahan Balas (Bertulis) Pempetisyen hendaklah difailkan pada atau sebelum 4 Januari 2005;

(x) Tarikh Keputusan Petisyen ditetapkan pada 28 Januari 2004 (should be 2005).

A Adalah selanjutnya diperintahkan semua pihak mematuhi jadual waktu yang ditetapkan seperti di atas dan sekiranya terdapat fakta-fakta baru ditimbulkan Pempetisyen dalam Afidavit mereka pihak-pihak lain boleh menghujah supaya fakta atau isu tersebut tidak dipertimbangkan.

B Semua pihak-pihak hendaklah memfailkan Afidavit dan Hujahan Bertulis masing-masing seperti yang ditetapkan di sini.

[7] Though by the said order, the decision on the petition of Sateras was scheduled for 28 January 2005, it was adjourned to C 31 January 2005 wherein the court made the following order:

MAKA ADALAH DIPERINTAHKAN bahawa Mesyuarat-mesyuarat Skim yang diadakan pada 10 September 2004 adalah tidak sah dan terbatal dan Petisyen ini adalah ditolak dengan kos.

D **[8]** Sateras being aggrieved with the said decision filed a notice of appeal on 2 February 2005 to the Court of Appeal. However, the notice of appeal described Sateras as petitioner and no respondent/s to the appeal was cited. Even the record of appeal made no mention at all of any respondent and it contained only E the order appealed against in its draft form.

[9] Now, back to the notice of motion of the applicant. First, the complaint with regard to the notice of appeal of Sateras. In the affidavit filed in support of the motion it was affirmed that the F 10 parties (interveners) ought to have been named as respondents in the appeal by Sateras as the learned judge had on 3 November 2004 directed that all the said interveners be made parties to the petition action of Sateras. The decision of the learned judge of 31 January 2005 was made after hearing counsel for Sateras and the G various counsel for the various interveners. Hence, the failure to cite the interveners as respondents to the appeal is fatal resulting in the appeal by Sateras not being properly brought. Hence it should be struck out in limine.

[10] As to the complaint against the record of appeal, the H affidavit in support deposes that some named relevant documents were excluded from the record despite being told *vide* his solicitor's letter of 4 March 20005 to have them included. This is in the light of the directions of the learned judge on 3 November 2004 that the various interveners' applications under O.S. No. I D5(D4)-24-194-2003 ("RO Actions"), and O.S. No. D5(D4)-24-256-2004 ("Injunction OS") and the petition of Sateras be heard

together, with the petition being the main action. Hence, the documents relating to the RO actions and the injunction OS ought to have been included in the said record. Further, the draft order had failed to include some of the cause papers filed and referred to in the court below. Hence, an amended draft was proposed by the solicitors for the applicant. The amended draft index and the approved draft order dated 31 January 2005 (as amended) were returned to the appellant's solicitors on 4 March 2005. Despite the aforesaid, the appellant proceeded to file and serve the appeal record and draft order dated 31 January 2005 as they were, without taking into consideration any of the amendments put forward for the applicant. Consequently, Sateras had failed to comply with r. 18(4)(a) and (c) and r. 18(6) and of the Rules of the Court of Appeal 1994, and also with O. 42 r. 8(3) and (4) of the Rules of High Court 1980. By a letter of 9 March 2003, the appellant was given notice of the defective notice of appeal and appeal record. It is further averred that the appellant had failed to comply with r. 18(4) of the Court of Appeal Rules 1964 in that the appeal record contains only the draft order dated 31 January 2005 and not the sealed order as required. Hence, the appeal has not been properly brought and as such should be struck off in limine.

[11] Learned counsel for the applicant submitted that having been left out as respondents in the appeal papers, the applicant and the other interveners cannot as of right participate in the appeal in the Court of Appeal, not being a party or parties to the appeal. In the event that the result of the appeal goes against their interests, the issue of *locus standi* would again arise in the Federal Court later when seeking leave to appeal there as they were nowhere cited as parties to the appeal in the Court of Appeal. The other aspect is on the question of assessment of costs. In the course of the proceeding in the High Court, the applicant and the other interveners were served with notices of hearing but they were not named as parties in the proceedings. He has been informed by some of the interveners that they were not even told of the last hearing date. This is due probably to the fact that the registry has no records of them.

[12] Our attention was drawn to p. 44 of encl. (30) of the case file. It is a copy of a summons in chambers dated 2 November 2004 of the applicant under O. 88 r. 2(1) of the Rules of the High Court 1980 seeking, *inter alia*, for an order that the applicant be

made a party to the petition proceedings and that the title of the proceedings be amended to include the applicant as a defendant or as an intervener. According to learned counsel, this application was formally made as a precautionary measure and that the application was heard on 3 November 2004 together with the petition of Sateras and other pending applications. However, in the manner the learned judge approached the matter of the petition and other interlocutory matters as reflected in the order of court of 3 November 2004, no specific order for making the interveners as parties to the petition was extracted. But it was clear that the applicant is a party to the proceedings and has the *locus standi* in the appeal based on the court order of 3 November 2004 mentioned earlier. This is evidenced further by the directions of the learned judge directing the applicant to file affidavits and written submissions in support of the applicant's opposition to the petition of Sateras.

[13] Learned counsel for the applicant also submitted that Sateras had failed to comply with r. 18(4)(a) and (c) and r. 18(6) of the Court of Appeal Rules 1994. Our attention was drawn to a copy of the solicitors' letter dated 4 March 2005 addressed to the solicitors for Sateras which is at p. 126 of the Motion papers drawing their attention to the exclusion by Sateras of various documents listed therein from Part A of the draft index supplied on behalf of Sateras. They are the various interlocutory applications relating to the main petition and requesting them to be included in the Record of Appeal for the reason that on 3 November 2004 the learned judge had ordered the various interlocutory matters and the petition itself to be heard together. But sadly no action was taken. One of the decisions of the learned judge made therein was to declare the meetings held by Sateras as being null and void. This arose out of the interveners' application and objection during the proceedings before the learned judge. Despite all these, the applicant in particular is not made a party to the appeal in the Court of Appeal by Sateras.

[14] In reply, learned counsel for Sateras in his submissions maintained that it did not name any of the interveners including the applicant as parties to the appeal by Sateras because there was never any formal hearing held on the application to be made parties. No order on the matter was also drawn up.

[15] At this juncture, we gave counsel for both parties an opportunity to discuss the matter among themselves with a view to come to an amicable settlement over the issues raised in the notice of motion of the applicant. When we resumed, we were told by learned counsel for the applicant that for the applicant, he is prepared to suggest that Sateras would now formally ask for leave of this court to amend the defective notice of appeal and the appeal record so as to comply with the requirements of the rules relating to parties and documents. However, when this suggestion was put to counsel for Sateras, it was rejected. In the circumstances, he would ask for more time to do research on the matter. This was confirmed by learned counsel for Sateras for the reason that there was no formal hearing of the application to intervene and also that there was no order extracted as submitted by him earlier. He submitted that various cause papers were served on all "interveners" because they were present in the petition proceedings and they were allowed by the learned judge to file affidavits and to oppose the petition of Sateras. But they were not truly parties to the appeal.

[16] In the circumstances, we adjourned the hearing of the motion and gave each party a period of two weeks to send to us and to exchange between them full written submissions on the issue of *locus standi* of the applicant in the appeal by Sateras. We have since been provided with the necessary written submissions.

[17] Hearing of the motion was resumed on 15 June 2005. To our surprise, learned counsel for Sateras informed us that he conceded that the appeal by Sateras was not proper. The failure to cite the applicant as a party was due to a misapprehension. However, he submitted that there is no real prejudice to the applicant which cannot be compensated by costs. From the very beginning the applicant and other interveners have been served with every single document that has to be served in relation to the petition by Sateras. Then, the learned counsel requested for an adjournment to await Sateras' application for leave to make the necessary amendments to the notice of appeal and the records of appeal relating to the appeal.

[18] We could not agree to the request for any adjournment as already a lot of judicial time had been wasted unnecessarily caused by the attitude of counsel for Sateras. At one stage, the applicant even suggested for Sateras to make whatever necessary application to have the appeal papers amended but it was flatly

refused and after the adjournment granted, we felt that it is not prudent for Sateras to have to make such an application now. We accepted the concession made by learned counsel for Sateras that the appeal papers are truly not in order so as to make them a competent appeal before us. In *Goh Chin Chye & Anor. v. Peck Teck Kian Realty Pte. Ltd.* [1982] 1 MLJ 117, the respondent brought an action against the appellant seeking possession of the premises on the ground that the appellant had sublet the premises in question to R at a monthly rental in excess of 110% of the reasonable rent of RM26 p.m. under the Singapore Control of Rent Act (Cap. 266). In the proceedings in the court below, R was a party to the suit. The learned Senior District Judge made a decision against the appellant. In the appeal to the District Court of Appeal, the appellant did not cite R as the 2nd respondent. The Court of Appeal dismissed the appeal by the appellant holding that R was a necessary party as his status and legal rights would be directly affected by any substantive decision in the appeal. As the appellant had failed to comply with O. 49 r. 15(1) of the Subordinate Courts Rules, the appeal was dismissed without deciding on the substantive merits of the appeal. In the present appeal before us by Sateras, by not citing the applicant as a respondent, being one of the interveners in the court below, and necessarily a party in the proceeding, his status and legal rights would be directly affected by any substantive decision in the appeal, if we were to go on hearing the appeal on merits. In the event that the decision in the appeal goes against its interest, the problem would await them in the Federal Court when an attempt is made to seek the leave of the Federal Court to appeal against the decision made by this court. Also, the applicant in the course of the proceedings in the court below had incurred costs in opposing the petition. By not having been cited as a Respondent in this appeal, it would be facing a problem when it comes to the question of its costs against the appellant.

[19] In *Dollar Valley (M) Sdn. Bhd. v. Rimba Raya Sdn. Bhd. & Ors.* [2004] 4 MLJ 6, the appellant was the holder of a mining license. During the subsistence of the license, the Senior Inspector of Mines by mistake cancelled the license for the reason that the mining land had been allocated for a mixed development project by the State Government. Subsequently the Senior Inspector informed the appellant that the wrong mining license number had been cited. The appellant filed an appeal with the High Court against the decision of the Senior Inspector. Other parties were

cited as respondents but not the Senior Inspector against whose decision the appellant was aggrieved. As to the objection raised as to the competency of the appeal, the High Court held, dismissing the appeal, that the respondents cited were not parties directly affected by the appeal. The Senior Inspector of Mines should have been named as a party in the appeal and be served with the notice of appeal. As this was not done, the appeal had therefore not been properly brought before the court.

[20] On the issue of the breach of the various provisions of the Court of Appeal Rules 1994, this court in *Low Cheng Soon v. TA Securities Sdn. Bhd.* [2003] 1 CLJ 309 held that the word 'shall' used in r. 18(4)(c) of the Rules reflects a measure of mandatoriness in it. This is a mandatory rule and must be strictly adhered to. Since the rule speaks of 'all documents put in evidence', this meant that the appellant had to include all the exhibits produced before the High Court. It was not for the appellant's counsel to decide or say that only two exhibits were material. It was for the court to decide which exhibits were material and relevant to the appeal. The court also held that the importance of the Rules of Court cannot be ignored as otherwise the courts would be faced with endless problems involving the administration of justice. In the appeal before the court, the non-compliance resulted in a huge number of exhibits being left out of the record of appeal. Despite being informed by the respondent's counsel of his objection, the appellant showed no response – an attitude which amounted to a blatant disregard for the Rules. The appellant also made no attempt to apply for leave to file a supplementary appeal record. The appeal was thus not properly brought before this court.

[21] Looking at the matter before us arising out of this motion of the applicant, a similar attitude was adopted by Sateras in pursuing with its appeal. Only at a late hour when it is cornered that a faint attempt was made to seek leave to regularize the appeal process. Such an attitude cannot be condoned.

[22] In the circumstances, we were left with no alternative but to allow prayers 2, 3, 4 and 5 of the motion of the applicant and we held that indeed there was no proper appeal before us. We accordingly, struck off the appeal and ordered that costs be awarded to the applicant.